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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD ROLAND MEDEIROS,

Defendant and Appellant.

G046065

(Super. Ct. No. FMB007584)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of San Bernardino County, Rodney A. Cortez, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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In *People v. Medeiros* (Jan. 28, 2010, G042120), a nonpublished opinion, we affirmed defendant Richard Roland Medeiros’s conviction for second degree murder arising from a fatal automobile crash that killed his girlfriend while defendant drove under the influence of alcohol and marijuana. We rejected his complaints of instructional error, and his challenge to the sufficiency of evidence to support his convictions.

In September 2011, Medeiros submitted a motion in propria persona to the San Bernardino Superior Court seeking a “restitution hearing for reconsideration of ability to pay and constitutionality of excessive fines.”<sup>1</sup> (Capitalization omitted.) He asserted the trial court had imposed a “restitution fine” of \$11,996 without considering his ability to pay. Medeiros submitted his declaration in support of the motion stating he was a state prisoner and “due to the circumstances of his disability of imprisonment he is unable to pay the restitution fine imposed” and would “be paying on the restitution fine for years (if not for the rest of his life) at his present earning ability, which is \$0.00/month if that.” The lower court denied the motion in a minute order without hearing.

Medeiros filed a notice of appeal from the order. We appointed counsel to represent Medeiros on appeal. Counsel filed a brief setting forth a statement of the case. Counsel did not argue against his client, but advised this court he found no issues to support an appeal. We provided Medeiros 30 days to file his own written argument, but we have received no response from him. After conducting an independent review of the record under *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

Medeiros’s appellate lawyer identifies a single potential issue for our consideration: Whether the trial court abused its discretion by declining “to hold a

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<sup>1</sup> The administrative presiding justice transferred the appeal to this division under California Rules of Court, rule 10.1000(b)(1)(A).

hearing to reconsider the amount of . . . Medeiros’s restitution fine and victim restitution.”

### *Restitution Fine and Victim Restitution*

Penal Code section 1202.4<sup>2</sup> generally requires the trial court in a criminal case to impose both a restitution fine (§ 1202.4, subd. (b)) and direct restitution to “a victim [defined to include the immediate surviving family of the actual victim] of crime who incurs any economic loss as a result of the commission of a crime” (§ 1202.4, subds. (a)(1) & (k)(1)). In the case of a fine, the court must impose one unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. (§ 1202.4, subd. (b).) The fine is set at the discretion of the court commensurate with the seriousness of the offense. At the time of the offenses in this case, the minimum fine was \$200 and the maximum fine was \$10,000. The defendant’s inability to pay is not considered a compelling and extraordinary reason not to impose a restitution fine, but may be considered in increasing the amount of the restitution fine in excess of the minimum fine. The court considers various factors, including the defendant’s ability to pay and future earning capacity, in setting the amount of the fine in excess of the minimum. (§ 1202.4, subd. (d).) The court sets the fine at the sentencing hearing, and the defendant may seek review of the fine on appeal from the judgment.

When the defendant’s acts inflicted an economic loss on the victim, the court must order the defendant to make restitution to the victim based on the amount of loss claimed by the victim or victims or any other showing to the court. (§ 1202.4, subd. (f).) If the court cannot determine the amount of loss at sentencing, the restitution order must include a provision to determine the amount at the direction of the court. The

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<sup>2</sup> All further statutory references are to the Penal Code unless specified.

court must order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. The sentencing court's restitution order must identify the victim and loss, and it must reimburse the victim for every determined economic loss incurred as the result of the defendant's criminal conduct. The statute lists specified categories of losses. (§ 1202.4, subd. (f)(3)(A-L), (4)(A).) The court must order full restitution to the victim unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. But “[a] *defendant's inability to pay shall not be considered a compelling and extraordinary reason not to impose a restitution order, nor shall inability to pay be a consideration in determining the amount of a restitution order.*” (§ 1202.4, subd. (g), italics added.)

Finally, “[t]he defendant has the right to a hearing before a judge to dispute the determination of the amount of restitution. The court may modify the amount, on its own motion or on the motion of the district attorney, the victim or victims, or the defendant. If a motion is made for modification of a restitution order, the victim shall be notified of that motion at least 10 days prior to the proceeding held to decide the motion.” (§ 1202.4, subd. (f)(1).)

Here, Medeiros failed to include a copy of the order he sought to modify. If he was challenging a restitution *fine*, that order would have been made at the time of sentencing. His failure to raise an issue concerning his ability to pay the fine in his previous appeal from the judgment precludes consideration of the issue now. (See *People v. Nelson* (2011) 51 Cal.4th 198, 227 [defendant forfeited claim court imposed a \$10,000 restitution fine without considering his ability to pay by failing to object at the sentencing hearing].) The modification procedure specified in section 1202.4, subdivision (f)(1), concerns direct restitution to the victim, not restitution fines.

More likely, given the \$11,996 sum listed in his motion exceeds the statutory maximum for restitution fines, Medeiros sought to modify the direct restitution award for his victim's economic losses or assistance provided by the Restitution Fund (Gov. Code, § 13950 et seq.), which might have included medical, funeral, or burial expenses. As noted above, Medeiros's ability to pay is not a consideration in determining the amount of a victim restitution order. (§ 1202.4, subd. (g); *People v. Draut* (1999) 73 Cal.App.4th 577, 582 [inability to pay is not a circumstance to order less than full restitution]; see *People v. Harvest* (2000) 84 Cal.App.4th 641, 650 [restitution is limited to actual and demonstrated economic loss, and can hardly be condemned as excessive; it is a civil remedy and not a criminal penalty].) The court correctly denied Medeiros's motion to modify the restitution amount on this basis. No hearing was required.

Our independent review of the record discloses no arguable issues.

#### DISPOSITION

The postjudgment order is affirmed.

ARONSON, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.